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Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*

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I. INTRODUCTION

Since 1976 I have examined the movement to re-form dispute ideology in the United States. Two aspects of my work have demonstrated 1) the existence and force of the movement to "trade justice for harmony" in legal practice and 2) the ideological nature of the movement, as demonstrated by numerous studies, which show both that the "litigation explosion" was an ideological construct, and that Alternative Dispute Resolution is not a universally desired improvement, but rather an often coercive mechanism of pacification. In this paper I ask a new question: Why did (do) members of the legal elite accept this ideological take-over of their profession with such equanimity?[1]

While in previous work I examine harmony ideology at work on unsuspecting citizens, I will argue in this article that harmony ideology - the use of a rhetoric of peace through consensus - finds fertile ground within the legal profession through cultural control. Social control relates to "intense influence," working extraordinarily long hours with little contact with the outside world, and also focuses on hierarchy: The Chief Justice does not have to present evidence for lawyers to believe him. Social and cultural power mechanisms amount to controlling processes. Such control mechanisms have received inadequate attention both within and without the legal profession. In the United States, we have constitutional laws to protect us from overt acts of domination, and we

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1. This question was first posed in a talk I presented to the 45th Annual Judicial Conference of the Fifth Judicial Circuit in Jackson, Mississippi, April 20, 1988. I acknowledge with gratitude the help of colleagues and students - and in particular the eagle eye of lawyer-anthropologist Ellen Hertz - in clarifying the ideas in this paper.

have activist lawyers who are alert to overt controls. However, there is less protection from the insidious exercise of power through indirect controlling processes. What anthropologists have learned over the past fifty years is that it is exactly those symbols, placed by any society outside the jurisdiction of its formal social control systems (what Aldous Huxley in 1958 called "impersonal forces"),[2] that we find control operating most adamantly. Yet, there is no compatible body of laws or activist concern with covert power mechanisms - such as group think or ideological control - which are so central a part of modernity, and which are accelerated by commercial media and political organizations.

Legal scholars and lawyers should pay more attention to controlling processes not only because of increasing incidences of thought control allegations in legal suits involving cult and cult-like activities, but also because the exercise of intense influence is so pervasive in late twentieth-century America. Even lawyers and judges may be subjected to intense influence under certain conditions.

Over the past twenty years lawyers and judges in the United States have been pummeled in the popular media and in dispute resolution journals by an accelerating wave of antagonism toward litigation and the adversarial process. During the same period, enthusiasm for alternative dispute resolution (ADR) has promoted these mechanisms as being efficient, as providing access to resolution, and as exalting harmony rather than rights. The intensity was striking and so was the impact. So successful has the movement against litigation and the adversary process been, that there has been widespread acceptance of a legal harmony model of law as an answer to the concerns of how to deliver justice to the many.

The movement was not about theory. It was directed towards practice. ADR was on the agenda of legal practitioners. Trial lawyers met to ponder their complicitous part as promulgators of anger and the adversary process. Federal judges bought into the reframing of what is wrong with our legal system, and often indiscriminately accepted the ADR analysis. Even stranger were the 1960's activist lawyers, who are now born-again mediators who accept ADR forums and use them to erase issues of class, gender, and race, to "treat people equally." By 1993, ADR has become a major industry, which includes social workers, mental health professionals, lawyers, behavioral scientists, and dozens of journals

2. *See* ALDOUS HUXLEY, BRAVE NEW WORLD AND BRAVE NEW WORLD REVISITED (1958).

where ADR is formalized.[3]

The ADR rhetoric of the past two decades was a response to the law reform discourse of the 1960s, a discourse concerned with justice and root causes, and with debates over right and wrong. In the early 1970s, when the justice talk of the various rights movements (civil rights, consumer rights, environmental rights, etc.) was replaced by talk of harmony and efficiency, the public debate was over the question of "too much litigation." A change in the manner of thinking about rights and justice was shaped through a new discourse, and by means of this discourse produced a movement against the contentious or adversarial qualities of American law. In some ways, it was a rebellion against law and lawyers - often by lawyers themselves. A movement to control litigation was being constructed to replace justice and rights talk with what I call harmony ideology, the belief that harmony in the guise of compromise or agreement is ipso facto better than an adversary posture.[4]

In any period of history, harmony ideology is accompanied by an intolerance for conflict.[5] The intention to prevent the expression of discord rather than to deal with its cause takes on prominence. The rationalization for ADR was from the outset articulated as protecting the courts from the "garbage cases," such as gender, environmental, and consumer cases, as well as protecting the courts from overload.[6] The Harvard Law School was in the lead, and soon a plethora of new courses and journals began to appear in law schools around the country, all of which included training in alternative dispute resolution. After I summarize the components that became the centerpiece of the ADR movement, I will focus on the questions: Why have so many people in the legal profession fallen prey to ADR rhetoric? Why did members of

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3. *See* LAURA NADER, NO ACCESS TO LAW (1980); *see also* John J. Dieffenbach, *Psychology, Society, and the Development of the Adversarial Posture*, 7 OHIO ST. J. ON DISP. RESOL. 261 (1992) (contrasting the adversarial system with cooperation and valuing the latter as if such value were obvious); Laura Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998 (1978) (summary of findings).

4. *See* Laura Nader, *Harmony Models and the Construction of Law*, *in* REFORMULATING DISPUTE RESOLUTION 41-59 (Peter Black et al. eds., Wakeview Press 1991); *see also* LAURA NADER, HARMONY IDEOLOGY - JUSTICE AND CONTROL IN A ZAPOTIC MOUNTAIN VILLAGE (1990).

5. CAROL J. GREENHOUSE, PRAYING FOR JUSTICE (Roger Sanjek ed., 1986); JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 20 (1983); Laura Nader, *A Litigious People*, 22 LAW AND SOCIETY 1017 (1988) (reviewing CAROL J. GREENHOUSE, PRAYING FOR JUSTICE (1983)).

6. *See Pound Conference: Perspectives on Justice in the Future. Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice.* (A.L. Levin and R.R. Wheeler, eds., 1979).

the legal elite accept this ideological takeover of their profession with such placidity? I argue that harmony ideology - manifested in the reluctance of many lawyers to defend their profession against this ADR onslaught - finds fertile ground through mechanisms of hierarchy and coercive harmony.

In what follows, I sample settings related to influences in law practice, in mediation, and in the large law firm, and indicate how psychologists have cemented the disciplinary practices in law by means of therapeutic language such as "burn-out."[7] Working extraordinarily long hours, with little contact with the outside world, lawyers are particularly susceptible to the kinds of control effects documented in cults. The cultural control works first by playing on a rhetoric of peace and harmony, a rhetoric with historic roots in American civic culture, and also through training in hierarchy which begins with lawyers' first acquaintances with law in law school and continues throughout their professional careers. Both hierarchy and harmony discourse constitute a movement to covert power mechanisms that have received inadequate attention in writings about the legal profession.

II. THE ADR EXPLOSION[8]

Today ADR has a history and a scholarship. People from fields as disparate as anthropology, history, psychology, law, and political science have been piecing together the story of the movement. Whether we speak of the work of Abel,[9] Harrington,[10] Hofrichter,[11] Nader,[12]

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7. *See* Richard Ofshe and Margaret T. Singer, *Attacks on Peripheral versus Central Elements of Self and the Impact of Thought Reforming Techniques*, 3 THE CELTIC STUD. J. 3 (1986); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545-1610 (1991); Richard Ofshe, *Coercive Persuasion and Attitude Change*, *in* 1 ENCYCLOPEDIA OF SOCIOLOGY 212 (E.F. Borgotta and M.L. Borgotta eds., 1992).

8. The sub-title was inspired by John H. Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975).

9. Richard L. Abel, *The Politics of Informal Justice*, *in* 1 THE AMERICAN EXPERIENCE (1982).

10. CHRISTINE B. HARRINGTON, SHADOW JUSTICE, (Contributions in Political Science, no. 133) (1985).

11. RICHARD HOFRICHTER, NEIGHBORHOOD JUSTICE IN CAPITALISTIC SOCIETY: THE EXPANSION OF THE INFORMAL STATE, (Contributions in Political Science, no. 171) (1987).

12. NADER, *supra* note 3.

Galanter,[13] Tomasic and Feeley[14], or others, the following questions are often shared: By what means was an ADR movement launched in a country where the rule of law was paramount? What have been the consequences of the shift from adversarial to harmony ideology in terms of the expressed purpose of law in the United States? What is the meaning of harmony ideology in relation to unequal relationships, and more broadly in terms of creating a culture of harmony which may be coercive, repressive, and basically undemocratic? It is the third question that is of interest in this paper.

Some might say that ADR is a hegemonic movement, in which the exercise of political control working through a combination of persuasion and force makes it appear as if persuasion is the predominant feature. The movement was one based on rhetoric and style at first, only later becoming legal practice. Acceptance of the rhetoric led to institution building. By means of new apparatuses, changes in the handling of civil cases came about - changes that functioned to suppress the realities of class, gender, and racial antagonisms in the United States, while affording efficiency and often cheaper dispute resolution for business. The image was of a reformed and informal law unfractured by power differences. In so far as it realized the opposite of its stated purpose, it was an unreal law reform movement.

For my research, the turning point was 1976, the year of the bicentennial celebration of the United States. During that year, the Roscoe Pound Conference, "Perspectives on Justice in the Future," was held in St. Paul, Minnesota, where Roscoe Pound delivered his long-remembered 1906 talk to the American Bar Association on "The Causes of Popular Dissatisfaction with the Administration of Justice."[15] The Pound Conference brought together judges and staff from all of our fifty states in what became a key social drama, the beginning of a serious attack on the adversary process. The Conference was described as serving "to arouse a new spirit . . . a new optimism about the possibility of creative innovation in the administration of justice."[16] The presenters were law-trained, and their messages covered the common theme of procedural reform from

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13. Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986).

14. ROBERT TOMASIC AND MALCOLM FEELEY, NEIGHBORHOOD JUSTICE: ASSESSMENT FOR EMERGENT IDEA (1982).

15. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. 295 (1906).

16. *Pound Conference: Perspectives on Justice in the Future, supra* note 6.

adversarial to alternative dispute resolution.

I examine the presentations[17] and give specific attention to the discourse because the Pound Conference was rich with a rhetoric designed to accomplish what Burke called "the manipulation of men's beliefs for political ends."[18] The rhetoric of ADR builds on the ideology of consent, hiding relations of force behind the notions of persuasion and mutual accord. The drama set the stage for the alternative dispute resolution movement. Each man in turn spoke about some version of the following complaints: The courts are crowded; American lawyers are too adversarial and the American people too litigious; new tribunals are needed to divert cases generated by the regulated welfare state; "cumulative tinkering" should be adopted as a strategy, a way of creeping in with reform. Furthermore, alternative dispute agencies were portrayed as agencies of settlement or reconciliation, peace rather than war.

In the years following the Pound Conference, the public was immersed in alternative dispute resolution rhetoric, which by the end of the decade had the quality of discursive cement. Chief Justice Warren Burger had set the tone for a change. In his work he was aided by members of the American judiciary, leaders of the American Bar Association, and the growing group of alternative dispute resolution professionals.[19] The rhetoric was restricted and formulaic, and its users were assertive and repetitive. They made broad generalizations, invoked authority and danger, and presented values as facts. The Chief Justice warned that adversarial modes of conflict resolution were tearing the country apart, and that there had to be a better way.[20] He claimed that Americans were inherently litigious, and that ADR was more civilized than the adversary process. His "Isn't There a Better Way?" speeches followed the peremptory style of assertive rhetoric, grounding the use of arbitration with reference to the time of Homer and Athenian law. Pointing to the early uses of arbitration, he said lawyers should serve as healers, rather than warriors, procurers, or hired guns. He also repeated that Americans were the most litigious people on the globe. During his time as Chief Justice, Burger continued to speak about lawyers as healers, and plaintiffs as patients needing treatment; there was little talk of rights, remedies, injustice, prevention, or unequal power.

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17. *See* Laura Nader, *The ADR Explosion - The Implications of Rhetoric in Legal Reform*, 8 WINDSOR Y.B. OF ACCESS TO JUSTICE 269 (1988).

18. KENNETH BURKE, A RHETORIC OF MOTIVES 41 (University of Cal. Press 1969).

19. One could examine Society of Professionals In Dispute Resolution (SPIDR) membership for a general sense of the range of ADR professionals.

20. Stuart Taylor Jr., *Justice System Stifled by its Costs and its Complexity, Experts Warn*, N.Y. TIMES, June 1, 1983, at A1.

The framework of a harmony law model took hold. Justice Burger was quoted as saying that "the nation was plagued 'with an almost irrational focus -- virtually a mania -- on litigation as a way to solve all problems.'"[21] Although there was common sense in Burger's speeches, the fact that many of his declarations were not supportable did not seem to matter. There was a momentum building. The ideology of harmony began to be believed and to be institutionalized. By the late 1980s, the newspapers, the major political speeches, the evangelical radio stations, the latest insurance copy, all had some comment on the litigation explosion and anti-litigation. The rhetoric was part of the formula central to building a movement that would implement a harmony ideology of legal reform. It did not hurt that there was a close fit between the rhetoric, the ethic of Christian harmony, the interests of corporations in cutting legal fees, psychologists and other therapists, the woman's movement, and a myriad of vested interests. The harmony law model was for some anti-law, anti-confrontation, anti-anger, and for many a response to the "too many rights" movement. Furthermore, the ADR movement was being spearheaded by the Chief Justice of the U.S. Supreme Court.

III. THE CRITICS OF ADR

Critics of the alternative reform movement since the mid 1970s are abundant, many of them seeking to separate myth and rhetoric from substantiated evidence. Because there are summaries of the leading critical works elsewhere,[22] let me simply say here that a number of critics provided evidence that challenged the assumptions of the Burger rhetoric.[23] They compared the United States with other European industrial democracies and concluded that the U.S. system of justice had inadequate public investment. Half as much was spent per capita on U.S. courts than in West Germany from 1960 to 1973. Two widely influential articles questioned the assumption of a litigation explosion and concluded there was no litigation explosion despite noticeable perceptions.[24] The same studies found that per capita use of regular civil courts in the U.S. was comparable to that of England, Australia, Denmark, and New Zealand, although somewhat higher than Germany and Sweden and far

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21. *Id.*

22. Nader, *supra* note 17.

23. *See generally* Robert L. Nelson, *Ideology, Scholarship, Sociolegal Change: Lessons from Galanter and the 'Litigation Crisis,'* 21 LAW & SOC'Y REV. 677 (1988).

24. *Id.* at 680.

higher than Japan, Spain, and Italy. According to these and other studies, the "litigation explosion" is more folklore than fact. Others asked what is so good about settlement or conversely, what is so bad about litigation?[25] After all, written law represents important normative conclusions about substantive justice which ADR circumvents. Other critics follow the contours and broader significance of the change and ask, as did Richard Abel, "[i]s the ambit of state control contracting or expanding?"[26] Consumers wrote outraged letters asking, when is arbitration really arbitration in referring to the conflict of interest when arbitration panels are sponsored, funded, and staffed by manufacturers and dealers. In many cases, the consumer was "complaining to Ford about Ford." Clearly, we need to differentiate more clearly when it is that we are improving dispute resolution and when we are being subjected to intimidation, because the more general finding is that successes in the field of alternatives are rare.

In addition, a series of studies began looking at ADR practice. Judy Rothschild studied a neighborhood justice center in San Francisco and wrote about the ideology of mediation. She noted that the ideology depends upon a negative evaluation of the traditional legal system and that it does not pursue the substantive aspects of conflict, nor identify standards of justice. Disputants are trained to associate litigation with alienation, hostility, and high cost.[27] On the other hand, the same neighborhood justice center portrayed mediation as a process that "encourages civic and community responsibility for dispute resolution," a defense against state law.[28] Rothschild observed that disputes are reshaped in the intake process so that value conflicts or interest conflicts become "communication problems." Facts about disputes and legal rights become disputes about feelings and relationships. The model Rothschild describes is in good part a therapeutic model. The difference between confrontations and violence is blurred, and in harmony ideology anger appears to be inherently violent.

When mediation becomes a process of communication, justice is measured by implicit standards of conformity, and as we will see, issues of what is just become irrelevant. The potential plaintiff becomes the

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25. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1817-18 (1986).

26. Abel, *supra* note 9, at 1.

27. Judy Rothschild, Mediation and Social Control (1986) (unpublished Ph.D. dissertation, Department of Sociology, University of California (Berkeley)). For a general review of "neighborhood justice" see SALLY MERRY & NEAL MILNER ET AL., THE POSSIBILITY OF POPULAR JUSTICE (forthcoming Fall 1993).

28. *See* sources cited *supra* note 27.

victim (or the patient), and the ethic of treatment prevails.[29] Furthermore, treatment by means of mediation fictionalizes the conflict. The reformulation of disputes shifts attention from employer negligence in workers' compensation to the injured worker, in the context of a privatized justice. Other studies began to show that, with the exception perhaps of intracorporate cases, ADR processes were not being used as widely as they might be.[30]

The hard sell stage was initiated to overcome public hesitancy and resistance to using ADR.[31] ADR became mandatory in many states, and its ideology spread into the schools, therapy, business organizations, hospitals, and every level of American life from the living room to the board rooms, and even into the White House (where observers regularly praise presidents for harmonious or mediating styles, rather than for assertive leadership). Professors in universities are negatively measured on their level of contentiousness, as are workers in white collar jobs, irrespective of work performance. Both style and organizational changes are imbued with conformist ideology, intolerant of dissent, what I have called coercive harmony.

Cultural imperialism, the struggle for the control and the construction of ideas for mind colonization purposes, is normally difficult to track.[32] But in the case of harmony law, it is easier to comprehend because much of what I describe is articulated in public spaces by means of professional and media formats. The Pound Conference was published and is now part of the public record. What has been less in the public eye is how it works, the "it" in this case referring to an ideology constructed with a practical purpose in mind. ADR was not meant to be abstract. A body of critical work dealt with whether and how real is the litigation explosion, or how great is the need for litigation.[33] The next research thrust was directed to examining institutions that were engineered as part of the ADR movement, institutions such as neighborhood justice centers or

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29. Bjorn Claeson, The Privatization of Justice: An Ethnography of Control (1987) (unpublished BA Honors Thesis, Department of Anthropology, University of California (Berkeley)).

30. *See* HOFRICHTER, *supra* note 11; *see also* Galanter, *Reading the Landscape of Disputes*, *supra* note 13, at 4; Galanter, *The Day After the Litigation Explosion*, *supra* note 13, at 3.

31. *See* VERMONT LAW SCHOOL, A STUDY OF BARRIERS TO THE USE OF ALTERNATIVE METHODS OF DISPUTE RESOLUTION (1984).

32. *See* EDWARD SAID, CULTURAL IMPERIALISM (1993) (calling attention to the processes by which culture is controlled and constructed).

33. *See* HOFRICHTER, *supra* note 11; *see also* Galanter, *Reading the Landscape of Disputes*, *supra* note 13, at 4; Galanter, *The Day After the Litigation Explosion*, *supra* note 13, at 3.

mediation settings, or older institutions like the Workingman's Compensation Act, or the courts, or court-annexed arbitration units.[34] Still others have made sporadic observations about the use of ADR by corporate bodies.[35] In the examples that follow, the main features of selection have been hierarchy and "soft" violence (where the manufacture of consent induces a moral panic that covers up unequal power relations, such as between men and women or junior and senior partners). I speak here about the kind of indirect control that serves to make people mute or afraid or both. Such control is exquisite as a powerful silencing technique. Legal policies affect the live domination of ordinary people in high and low places.

IV. How ADR and Hierarchy Work as "Soft" Violence: Mediation

When Chief Justice Warren Burger mentioned healing as more civilized behavior than contentiousness, he was, probably unwittingly, reiterating a European imperialist tradition that used a hierarchy of manners and public gesture to domesticate the subordinated and to insure the absence of contestation in the colonies.[36] Burger's phrases might appear trivial at first, but socializing people to silence by means of culture is rarely trivial, especially in a democracy constructed around ideas of free, open, and untrammeled debate. The manner in which ADR exploded onto the national scene, and the rhetoric by which Justice Burger promoted ADR, was seductive. Who could be against harmony or civilized behavior or healing or efficiency? The appeal was to a broad audience, and many, especially women, were attracted to the soft or gentle aspects of an informal justice.

The women's movement of the 1970s and 1980s, replete with a rhetoric of equality and relationships, was attracted to contextual rather than rule-centered, abstract thought. Many women had voiced criticisms of the family court system in the United States as a forum that could produce just results in a respectful and humane manner. Indeed, mediation was put forward as an alternative because it promised to be a feminist alternative to the patriarchally inspired adversary system. Mediation of family cases spread throughout the country and became mandatory in many states,

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34. *See* Claeson, *supra* note 29.

35. *See, e.g.*, Edward S. Herman & Noam Chomsky, Manufacturing Consent (1988).

36. *See* 1 Norbert Elias, The History of Manners: The Civilizing Process (Edmund Jephcott trans., 1978).

including California.[37]

In 1991, Trina Grillo, a law professor and mediator, published the first seething critique of mandatory mediation in relation to the inherently dangerous aspects of what she calls "process dangers" for women.[38] The fact that her article appeared in the *Yale Law Journal* is important because of its visibility and prestige. Central to Grillo's critique is the relation of law to the promises of mediation in family disputes involving men, women, and the custody of their children. Grillo measures the promise of the form, in this case mediation, against real cases and not abstract rules and hypothetical cases. She also measures mediation against adversarial justice in court trials.

Mediation promised centrality accorded to context; it was to have a place for emotion as well as rationality, and the parties were supposed to participate in determining their future. However, Grillo's work is about how mediation operates as control, control in defining the problem, control of speech and expression, and control over public record.[39] Mediation is a process that is confidential rather than public. Her analysis is both cultural and legal. She is pointed in her assessment of formal equality as a destroyer of social context and speaks of the destruction of rights that accompanies the limitation of discussion of fault and past facts in the case. She is most concerned with what happens when mediators frame cases between partners as equal control, when there is unequal responsibility.[40] Important also are her observations on the suppression of anger in mediation sessions, especially the prohibitions on female anger.[41] Grillo calls our attention to the notion of separateness that accompanies the expression of anger in a society where the idea of "the couple" prevails in definitions of male-female relations.[42] Finally, she states that choice of process is sabotaged by forced engagement; she sees mandatory mediation as a dangerous environment within which patriarchy and prejudice can flourish.[43]

Grillo's paper is brilliant because it requires a certain openness and brightness of mind to grasp indirect control patterns and to articulate

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37. *See, e.g.*, CAL. CIV. CODE § 4607 (Deering 1993); ME. REV. STAT. ANN. tit. 19, § 752 (West 1992); and OR. REV. STAT. § 107.179 (1991). Many other states have enacted statutes where mediation of family cases is at the court's discretion. *See, e.g.*, CONN. GEN. STAT. §§ 46b-53a (West 1992).

38. Grillo, *supra* note 7, at 1607-10.

39. *Id.*

40. *Id.* at 1569-72.

41. *Id.* at 1574-77.

42. *Id.* at 1577-79.

43. Grillo, *supra* note 7, at 1600-07.

their functioning.[44] As noted earlier, Grillo is both a law professor and a mediator, but not everybody makes such a powerful argument against mandatory mediation, or for a mediation that meets the truth in advertising standard. The model she is attacking is less one of law than of therapy, for as she notes "[t]he movement for voluntary mediation of divorce disputes began several decades ago as lawyers and therapists offered to help their clients settle their cases in a nonadversarial manner."[45] For the mediation movement, the point was not just to help clients, but to help them in a *nonadversarial* manner. It was the forum that attained first importance.

In 1961-62 when Lon Fuller discussed "The Forms and Limits of Adjudication," he was arguing that different problems require different solutions; he was not as much interested in whether something was settled in an adversary mode or not.[46] For Fuller, there is nothing inherently humane about one forum or another. It depends on what is before the "tribunal." It also depends on the consequences that follow. Yet, several decades later we find his pragmatism supplanted by a forum fetish, for which it is the forum that is or is not humane. Unlike Fuller, who is more or less working through the philosophical reasoning about adjudication, or Grillo, who is looking at consequences in real cases and about real people, Josh Rosenberg, also a law professor and mediator, writes a critique of Grillo's article called *In Defense of Mediation.*[47] In his work, Rosenberg uses the same formulaic Burger rhetoric: "[m]ediation has won praise from the bar, from numerous participants and practitioners and from scholars as a tremendous breakthrough in dispute resolution."[48] He uses metaphoric imagery in referring to "Grillo's horror stories," and a rhetorical trick to dismiss serious discussion of consequences: "[T]here is much in life that has the potential to do great damage."[49]

Mandatory mediation abridges American freedom because it is often outside the law, eliminates choice of procedure, removes equal protection before an adversary law, and is generally hidden from view. The situation is much like that in psychotherapy, little regulation and little accountability. Mind control activities operate best in isolation, and those

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44. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH, (Alan Sheridan trans., 2d ed., Pantheon Books 1977) (1975).

45. Grillo, *supra* note 7, at 1551 (footnote omitted).

46. Lon Fuller, The Forms and Limits of Adjudication (1961-1962) (unpublished manuscript, Harvard Law School). Fuller's "unpublished" paper was widely circulated. A later version was published in 92 HARV. L. REV. 353 (1978).

47. Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467 (1991).

48. *Id.* at 467.

49. *Id.* at 470.

who have read the literature on influence understand that people in life crises are vulnerable to coercive influence.[50] Divorce is one such life crisis. The mediation model described by Grillo is one belonging to the mental health professionals, so it is not surprising that the civil plaintiff becomes a patient.

The informal law of mediation is unwritten, which adds to the potential for abuse, and is for the most part unconsciously perceived. It is a process that often operates with the notion of moral minimalism "in which people prefer the least extreme reactions to offenses and are reluctant to exercise any social control against one another at all."[51] Under such conditions, couples are treated as if they were equal and it becomes irrelevant whether one member had abused, deceived, or otherwise oppressed the other. Discussion of blame or rights is avoided and replaced by the rhetoric of compromise and relationship; cultural notions of justice are factored out. As Grillo says, mediation becomes a "mutually regulated dance between oppressor and oppressed,"[52] thereby obscuring issues of unequal social power.

In a manner that is gripping, Grillo describes the exercise of a technique which discourages people from asserting their rights when they have been injured. She reminds us that rights assertion cannot flourish when discussion of fault and the past are not permitted.[53] A sense of disentitlement flattens the desire to seek redress. Like psychotherapy, the mediation model focuses on the individual, and assumes that the parties, as opposed to social ills, are responsible for all family problems. Flattening by insistence on formal equality is a subtle and powerful control because it is supported by American equality ideology. It is assumed, for example, that both parents are equally competent to take care of the children because discussion of fault and past is limited, evidence to the contrary is not entered. The consequences can be devastating for both mother and child. Grillo notes, "[t]he insistence of a mother that a young child not be permitted to stay overnight with an alcoholic father who smokes in bed might be characterized as a mother needing to stay in control."[54] Her observation that mediation does not take anger seriously enough is also

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50. *See, e.g.*, Margaret T. Singer and Richard Ofshe, *Thought Reform Programs and the Production of Psychiatric Casualties*, 20 PSYCHIATRIC ANNALS 188 (1990). Margaret T. Singer is a psychologist and therapist who has published widely on issues of intense influence as used in cults and as found in the cloak of professionalism.

51. *See* M.P. BAUMGARTNER, THE MORAL ORDER OF A SUBURB (1988).

52. Grillo, *supra* note 7, at 1561 (quoting Judith A. Libow et al., *Feminist and Family Systems Therapy: Are They Irreconcilable?*, 10 AM. J. FAM. THERAPY 3, 8 (1982)).

53. *Id.* at 1567.

54. *Id.* at 1568 (footnote omitted).

arresting because today mainstream America assumes that anger is bad. While there is in practice a possibility for the expression of anger in the adversarial context because anger is often a key component in the adversarial fight, in mediation sessions, expression of anger is discouraged and its suppression is particularly directed at women. Grillo finds this suppression destructive of energy needed for coping with crisis.[55] Her discussion of the social prohibitions against female anger,[56] particularly against women of color,[57] are astute observations from one who understands, like Fuller, that there are limits to particular forums. In Grillo's work, she argues that there are limits to what one can accomplish with suppressing protest, or what conversely is possible from legitimate expression of anger. Suppression of anger often leads to individual paralysis, self-hatred, depression, or worse. Grillo's case against mandatory mediation is a case against mind colonization, or intense influence publicly condoned in private spaces.

V. HOW ADR AND HIERARCHY WORK AS "SOFT" VIOLENCE: THE LARGE CORPORATE LAW FIRM

At this point, I would like to move the discussion from family conciliation issues to two settings in the practice of corporate law in order to indicate the wide range of intense influence in corporate law practice. One instance describes the manner in which corporate lawyers are controlled, and the other takes a glimpse at the way in which workers in that same law firm resist coercive harmony. In both instances, I am dealing with ongoing ethnographic observations from several large, international law firms in the San Francisco Bay Area. The research is being conducted by a research associate interested in issues of control in large law firms.[58] Most of the material which comes in the form of text, either expression, stories, or complaint of all the workers, is also informed

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55. *Id.* at 1576.

56. *Id.* at 1576-79.

57. Grillo, *supra* note 7, at 1579-81.

58. The researcher who provided me with the following data prefers to remain anonymous until the work has reached completion. It should be noted that not all large law firms have the same culture. *See also* Laura Nader, *Up the Anthropologist - Perspectives Gained by Studying Up, in* REINVENTING ANTHROPOLOGY 284 (Dell H. Hymes ed., 1972) (discussing the ethics of studying organizations that affect the lived domination of ordinary people, in high and low places, "[w]e should not necessarily apply the same ethics developed for studying foreign cultures, (where we are guests), to the study of institutions, organizations, and bureaucracies that have a broad public impact."); MARC GALANTER AND THOMAS PALAY, TOURNAMENT OF LAWYERS (1991).

by Robert Nelson and Duncan Kennedy.[59] The passages quoted at length should inspire the reader to question the "normalness" of working condition in such firms. The "what do you expect if you go to a big firm?" attitude among law students further works as pacification.

Corporate attorneys in large firms are affected by a system of cultural control which includes the concepts of "billable hours" and "tracking systems." Billable hours are used to measure time, productivity, and usefulness, and are indicators of future tenure with the firm. They are used to measure conformity and adherence to the rules as well as one's allegiance to the practice of law. The tracking system is directly related to billable hours, and is constructed to "weed out" those destined for partnership and to recognize those who are not. In the instance of billable hours, the total number of hours worked is measured, but special attention is paid to the hours logged after 7 p.m., and on weekends. Extended hours are highly valued and rewarded when yearly review comes about. The more you produce, the more you are expected to produce, but "love of law" has its measure. One senior associate told the following story:

> On Mother's Day last year a lead partner in the firm had to cancel his dinner engagement with his mother because a client called him and kept him occupied on the telephone for several hours. This was seen by some as truly real commitment to the firm and "love of law!"[60]

The control becomes clearer in instances when an attorney does not participate, that is, fails to bill the preordained number of hours as set by predecessors and fellow associates. "You could lose your window office and be put in the 'dungeon,' or your annual review can be affected and it can be a cause for termination of employment."[61]

If commitment does not extend beyond the hours of 9 a.m. to 6 p.m., one is ipso facto not a likely candidate for partnership. One attorney who was given his sixth year review was told by the managing partner of the firm:

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59. *See* Robert L. NELSON, PARTNERS WITH POWER (1988); Duncan Kennedy, *Legal Education as a Training for Hierarchy, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 40 (David Kairys ed., 1982); *see also* Stewart Macaulay, *Control, Influence, and Attitudes: A Comment on Nelson*, 37 STAN. L. REV. 553 (1985).

60. As discussed in footnote 58, this research was collected by a researcher who wishes to remain anonymous. In anthropology, this method of data collection, participant observation, is called ethnography.

61. *Id.*

> You have written many winning arguments and have represented the firm in winning cases. However, you come in at 9 and leave at 6, and rarely are you seen in the office on weekends. You treat this like a job and not like a lifetime commitment. You have a nonchalant attitude about your work here. . . . Therefore, you will get the minimum annual raise, and no bonus.[62]

The tracking system of many sorts and varieties continues to appear. The "partner track," is open to every new graduate of a prestigious law school. It is the path to power and wealth. The "mommy track" is defined by gender. Other tracks include many new possibilities and are referred to by a variety of names. Each track has one common denominator, attorneys are defined by their ability to generate revenue for the firm, which then becomes a measure of their commitment to the firm.

Although the partner track means that you are committed to the firm and could attain partner status, the "mommy track" is reserved for women for whom there is no partner track. Thus, in some firms special arrangements are negotiated for women who choose to work limited hours. There is no "daddy track." If you are a man and want to spend time with your family, the message relayed is do not work with a corporate law firm. Other tracks have a multitude of names and are in part created in response to too many partners with not enough legal work to go around. These names include: "contract partner," "non-equity partner," "non-capital partner," "limited partner," "permanent associate," and "toy partner." One associate analyzed it this way:

> It used to be every "normal joe" could make partner. Now it is more competitive. We are of the baby boom generation and there is not enough legal work to cover the high volume of attorneys in the marketplace. It used to be up or out. Either you became a partner or you were forced to leave the firm. It's no longer like this. It's not a profession any more, but it's big business. Lawyers are a commodity.[63]

Some corporate attorneys who do not make partner status move on to set up their own practices, while others remain permanent associates or "toy partners." The bottom line is again traced to commitment in hours as established through revenue generation. The term "toy partner"

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62. *Id.*
63. *Id.*

signifies an attorney who is not a serious full-time attorney, one not considered fully committed to the firm. There is no capital investment required, no voting rights, and no equal share of the profits. In sum, attorney rank is defined by pay level and commitment is defined by hours logged.

Billable hours are critical in establishing one's career track. It is a stratified system that has long-term effects on the law; quality is measured by money. Creativity and advocacy are replaced with homogenization and indifference. For recent law school graduates who dream of becoming partners in corporate law firms, the message is not to make waves. As Duncan Kennedy pointed out in 1982, the incremental socialization process into corporate culture begins in law school and continues into firm culture.[64] In exchange for the institution taking care of all of the contingencies of life, the associate renounces any claim to control the work setting or the content of what the lawyer does and agrees to show the "appropriate form of deference to those above and condescension to those below."[65] It has been argued that hierarchies foster dependence, conformity, and rigidity; some do. A newly appointed partner described his impressions of his first annual partners' meeting in the firm's newsletter:

> Even the most skeptical among us would be awestruck by their first glimpse of the Annual Meeting - a room the size of an airplane hangar strewn with conference tables set for 500 attorneys, name plates reflecting diversity rivaled only by the United Nations, voting machines on each table, and broadcast cameras positioned throughout the room to project the images of each speaker recognized by the chair onto four, thirty-foot screens positioned at the front of the conference room. . . . It's unfortunate that everyone in this firm, from service clerk to new partner, cannot view a portion of an Annual Meeting at least once, because I think it would give everyone doing so a better idea of what this place is all about.[66]

This image of corporate lawyers presents a workplace picture of authoritarian structure in which hierarchy is a key pattern, as is the notion of harmony or not making waves.

Let us now shift places and examine the work lives of those

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64. Kennedy, *supra* note 59, at 40.

65. *Id.* at 53.

66. *See supra* note 60.

working "below" in this law firm. Complaints are the entry point in glimpsing how the culture of hierarchy works on a day to day level when the corporate judicial personality which is typified by "love" for the practice of law to the exclusion of family, music, or citizenry, deals with non-attorney staff.

It is important to reveal the inner workings of this style of law firm and the way intense influence operates in the workplace because it affects not only the individual employees and their families, but also because the large firm shapes and projects the culture of the American legal profession. The firm relies on administrators to deal with the staff because it is less expensive than the alternative, having attorneys, who may not be comfortable dealing with staff problems, executing such duties. When conflicts arise within the large firm, a series of people - administrators, attorneys, managing partners, and committees - become involved. Administrators function as a bridge between the levels of hierarchy. They interpret and enforce the hierarchy. Resolution is not immediate; indeed, it may not be forthcoming at all. At times, management responses appease rather than address issues. Catchwords are used to hinder challenge or discourse. In the corporate setting, one often hears about "staying competitive" when pressed about working conditions, and "you're too sensitive" when dealing with personal issues. Catchwords act to maintain control over people. The language is coercive. When there is general unrest, the control language of the workplace becomes efficiency, harmony, and the need to stay competitive.

An anonymous system for logging complaints was set up for a brief period in a large law firm under study. Because their anonymity was protected, workers felt free to express themselves; there was less self-censorship. The initial response to frank, spoken worker complaints came from the managing partner as follows:

> Messages that represent ventilation of strongly held negative feelings do not seem to seek a constructive response. Is there a nice way for me to say that I am surprised by the tone of the messages? (It goes without saying that the messages also hurt the feelings of those of us who spend much of our time trying to make this a better work place.)[67]

Ventilation of negative feelings disrupts harmony and efficiency of the office and must be discouraged or silenced. Before silencing however, other staff entered the fray:

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67. *See supra* note 60.

> [W]ith all due respect, and in all sincerity, intending no hostility or negativity; look at all the benefits taken from us. We lost our Christmas bonuses. We lost paid compensation for unused sick leave and were forced to pay medical and dental. Medical and dental costs were raised, and incentive for working overtime was lost when we lost compensation for the first hour worked after seven. *The New York Times* reports that the average partner made $350,000 in 1990-91. . . . While they reap top-notch pay off 'teamwork,' a large part of the team is told they don't deserve top-notch pay due to 'market rates.'[68]

When complimented on being a staff to be proud of, someone shot back, "[that is] like calling a Steer a Bull . . . he's grateful for the compliment but would rather have restored what's rightfully his!" The manager responded, "[p]lease explain, I don't understand this one."[69] Another noted:

> I agree that the support staff here is underpaid and unappreciated. They are treated with little or no respect. But it is not simply the support staff . . . I have seen partners humiliate and mistreat associates, sometimes in front of clients and many times far worse than any of the staff has been mistreated or humiliated.[70]

The managing partner responded to complaints by saying, "[w]e made changes in benefits several years ago because we thought we needed to make these changes to stay competitive, and to make our system 'fairer.'"[71] The workers responded to the double-talk by stating, "[t]here is a general perception that the Partners' only concern is increasing their own profits and salaries at any cost. PARTIES ARE NOT THE SOLUTION."[72] Another worker paraphrased the responses from the administration, "[i]n other words . . . maybe you should try our new counseling program?"[73] Another said that if management would let them have their benefits back, there would be no need for a counseling program. Once again the complainant is a patient, and in this instance

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68. *See supra* note 60.
69. *See supra* note 60.
70. *See supra* note 60.
71. *See supra* note 60.
72. *See supra* note 60.
73. *See supra* note 60.

able to speak only due to protection from being identified; while the management searches for a constructive response, one that is not "negative." Harmony and hierarchy generate powerful controls on those who wish to voice but not exit.[74]

VI. THE ROLE OF PSYCHOLOGY IN CONTROL

Some years ago, I was invited to a southern law school to discuss issues of lawyer burn-out. My basic argument was over the psychologizing of phenomena that were not about the psyche but about power relations. The main function of professional societies might be to advance professional responsibility and to guarantee professional independence. Without the backing of professional societies, the law professional is an individual having to perform an act of courage in order to utter a simple statement of truth. The amount of courage it takes for one simply to speak one's mind or to act on one's conscience is indicative of the degree of authoritarianism in a system. In the case of lawyers, the stress removes the possibility of responsible articulation of critique. Problems which are structural in nature are called "burn-out" and described with certain key phrases: career dissatisfaction, lawyer unhappiness, occupational diseases. Notice some of the titles of articles on the subject of lawyers: *Attorneys are Among the Most Severely Stressed Groups*;[75] *Law Practice: The Thrill is Gone*;[76] *Occupational Diseases Abound for Attorneys*;[77] *Attorney Burnout: Law and Disorder*;[78] *The Lawyers' Health: Coping with Stress*;[79] *Forty Percent of Young Lawyers Unhappy*;[80] *Associate Blues*;[81] *Pressure Blamed for Lawyers' Divorce*

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74. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970) (discussing democratic styles associated with each option).

75. Gary L. Lefer, *Attorneys are Among Most Severely Stressed Groups*, N.Y. L.J., Sept. 29, 1986, at 23.

76. Andrew S. Ross, *Law Practice: The Thrill is Gone*, PA. L.J. REP., Sept. 8, 1986, at 2.

77. Jacob A. Stein, *Occupational Diseases Bound for Attorneys*, NAT'L L.J., Aug. 18, 1986, at S14.

78. Brian S. Gould, *Attorney Burnout: Law and Disorder*, NAT'L L.J., May 7, 1984, at 14.

79. Christine M. Panyard, *The Lawyer's Health: Coping with Stress*, 56 N.Y. ST. B.J. 42 (1984).

80. *Forty Percent of Young Lawyers Unhappy*, N.J. L.J., Jan. 21, 1982, at 16.

81. Robert Henley and Barbara Cottman Becnel, *Conferees See Serious Problems in Associate Blues*, L.A. DAILY J., Aug. 12, 1987, at 1.

Rate;[82] *The Best and the Brightest, Bored and Burned Out*;[83] *Cocaine Blues: Lawyers Said to be Vulnerable*;[84] *Lawyers Have as Much Heart Trouble as Doctors*;[85] *The Happiest Lawyers: They Teach.*[86] The usual solutions proposed are peer assistance, support committees, or some form of therapy.

Psychological analysis is actually part of the control structure and part of the problem, as with ADR mediation. In an article called *Lawyer Burnout - It Can Happen to Anyone*,[87] two psychologists argue that the origin of the burn-out problem was the client and client loads. The cycle starts with continuous contact with clients and excessive caseloads. Solutions proposed: more training in interpersonal skills in law schools, confronting the clash of goals and expectations, and working out problems of too high idealism. The language they used stressed "discussing problems," "sharing feelings," "getting advice," "taking work breaks," "finding a sympathetic shoulder to cry on," "finding humor in the grim," and, using psychological support systems. Maslach and Jackson marvel:

> [w]ithin the last decade, there has been a tremendous surge of interest in the problem of burn-out. Although it was virtually unheard of prior to the late 1970s, it suddenly became a very popular topic. Consequently, there has been a tremendous proliferation of workshops, training materials, and organizational interventions planned by burn-out consultants. Burn-out has become big business.[88]

When we move from justice to harmony, and from voicing to silence, we suffer depression. This is an observation made by some of our prominent psychoanalysts. So-called burn-out - this syndrome of

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82. Michael Hall, *Pressure Blamed for Lawyers' Divorce Rate*, L.A. DAILY J., Jan. 20, 1988, at 5.

83. Timothy Harper, *The Best and Brightest, Bored and Burned Out*, A.B.A. J., May 1987, at 28.

84. Nancy Blodgett, *Cocaine Blues: Lawyers Said to be Vulnerable*, A.B.A. J., May 1986, at 25.

85. *Lawyers Have as Much Heart Trouble as Doctors*, 30 CURRENT MED. FOR ATT. 13 (1983).

86. James S. Granelli, *The Happiest Lawyers: They Teach*, NAT'L L.J., Aug. 11, 1980, at 10.

87. Christina Maslach and Susan E. Jackson, *Lawyer Burnout*, 5 BARRISTER 8 (1978) (arguing that while burn-out can happen to anyone, those who have excessive caseloads are particularly prone); *see also* Christina Maslach and Susan E. Jackson, *Burnout in Organizational Settings*, 5 APPLIED SOC. PSYCHOL. ANN. 133 (1984).

88. Maslach & Jackson, *Burnout in Organizational Settings*, *supra* note 87.

"emotional exhaustion, depersonalization, and reduced personal accomplishment" - has less to do with people who work with people in some capacity, and more to do with articulate or even inchoate perceptions of wrong and right. Burned-out professionals are the canaries in the workplace. Something is wrong with the definition of legal work that cannot be solved by harmonizing, such as sharing feelings or defining problems as personal, or by moral minimalism. The hypothesis that burn-out is characteristic of "people work" occupations needs rethinking and stimulates a search for more plausible explanations, one of which is found in the substance of this paper, trading justice for harmony. A shift from earlier concern with ethics, rights, and corporate domination to a concern with personal and psychological states the shift from class injustices and root causes to concerns with a syndrome of emotional exhaustion, loss of will, malaise of spirit, and loss of energy and idealism is what one might expect to find when hierarchy and harmony merge. Albert Camus might have put it: When work is soulless, life stifles and dies.[89]

Some people react to enforced cultural uniformity; they find it oppressive. Duncan Kennedy's work on hierarchy in legal education stated it as part of a cumulative process:

> You will come to expect that as a lawyer you will live in a world in which essential parts of you are not represented. . . . And you will come to expect that there is nothing you can do about it. One develops ways of coping with these expectations -- turning off attention or involvement . . . participating actively while ignoring the offensive elements of the interchange, even reinterpreting as inoffensive things that would otherwise make you boil. These are skills that incapacitate rather than empower, skills that will help you imprison yourself in practice.[90]

To use the law to empower people through democratic means has been part of our national rhetoric. Such ideologies constitute purpose. Democratic purpose is unlikely to be accomplished by technical training, or an education minus a critical sense. Cultural uniformity in professional training may be momentarily efficient, but professional training that prepares young lawyers to understand the relationship between what they do and the rest of the society may protect the grand vision of American law from being reduced to narrow economic goals like billable hours. At

89. *See* ALBERT CAMUS, THE REBEL (1956).

90. Kennedy, *supra* note 59, at 57.

any rate, it may be the gap between idealism and large firm practice of law that renders law professionals at all levels of practice inchoate and vulnerable to harmony ideology, unable to argue for legal contestation,[91] and worse yet, unable to sift the evidence for any kind of "truth."

VII. CONCLUDING REMARKS

In conclusion, I return to the opening paragraphs. Why are members of the bench and bar so vulnerable to believing the rhetoric put forth by Chief Justice Warren Burger and his associates? Why did they not challenge his statements that the use of the courts is excessive or that Americans are too litigious or that informal justice is more just? While conceding that not all or maybe even most lawyers fell prey to the rhetoric, they were silent, and silence helped the drum beat along. The silence continues, in spite of refutation by legal scholars, the U.S. General Accounting Office,[92] the Rodino Committee Report that showed no explosion of tort actions,[93] *Business Week*,[94] and the National Center for State Courts.[95] Why have our lawyers and judges not corrected the record, when they see the business of their own courts being distorted and when they hear American companies speak as if the American judiciary were a part of the radical left? Many actually did believe the rhetoric, allowed it to prevail, and participated in its dissemination, but the answer goes beyond the hierarchical structures of our law schools and undemocratic corporate law firms. Most certainly moral minimalism results from an absence of critical thinking, or perhaps it is a result of a profession in which individuals are trained to do but not to think; or from a population immersed in therapeutic modes of thought. The lack of critical thinking also has to do with the way in which lawyers use the concept of evidence, the meaning of which is antithetical to its use in the natural and behavioral sciences. Evidence is used to win, and not necessarily to find the "truth" about a case, to separate fact from fiction,

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91. *See* William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565 (1985) (discussing some of the themes of the professional vision).

92. GENERAL ACCOUNTING OFFICE, PRODUCT LIABILITY: EXTENT OF "LITIGATION EXPLOSION" IN FEDERAL COURTS QUESTIONED (1988).

93. *See* Rodino Committee Report, Hearings on Liability Insurance and Tort Reform, House of Representatives, 99th Congress, 1986.

94. William B. Glaberson and Christopher Farrell, *The Explosion of Liability Lawsuits is Nothing But a Myth*, BUS. WK., Apr. 21, 1986, at 24.

95. VICTOR E. FLANGO ET AL., NAT'L CTR. FOR STATE CTS., THE BUSINESS OF STATE TRIAL COURTS 3, 63-77 (1983).

to challenge basic assumptions. Thus, along with lessons in neutralizing emotions and moral issues an absence of critical use of evidence leads to the "pack" mentality; follow the herd becomes the rule.

Take, for example, the issue of medical malpractice and the notion that medical malpractice awards are out of control. The idea that juries are increasingly moving toward bigger jury awards, although asserted, is not supported by the empirical literature, which supports a picture of medical malpractice at substantial variance with both the popular press and law review articles. The Medical Malpractice Project at Duke University Law School does not support the criticisms leveled against juries in medical malpractice cases.[96]

The drum beat serves as a battering ram to reduce the rights of victims in order to sue perpetrators of harm and to pacify the public at large. According to political writer Brownstein,[97] one result of trading justice for harmony is politics without conviction, without passion is:

> [p]ragmatic candidates who tend to be less polarizing, less critical of business interests and inclined toward solving difficult problems with compromises that avoid creating clear winners and losers. . . . What is occurring, particularly on economic issues is the Hands-Across-Americanization of Democratic politics . . . [b]uilding their appeals on the premise that everyone shares the same goals and need only be encouraged to hold hands and work together to solve the nation's problems.[98]

By itself, the concept of cultural control leads neither to explanation nor to understanding; there is no political or ideological institution which does not exercise control, nor is there indication in the phrase of who the agents of control are. Here Antonio Gramsci's idea of hegemony is useful in forcing us to look at the institutions through which dominant belief systems are transmitted.[99] Concepts like the informal state, or economic government help us to visualize the motivation of organizations and professionals who seek control through pacification; but to understand pacification or the struggle for freedom and autonomy,

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96. *See, e.g.*, Neil Vidmar, *The Unfair Criticism of Medical Malpractice Juries*, 76 JUDICATURE 118 (1992).

97. *See* Ronald Brownstein, *Where's the Political Heat? Democrats Lose Their Fire*, L.A. TIMES, July 12, 1987, § V (Opinion), at 3.

98. *Id.*

99. *See* ANTONIO GRAMSCI, PRISON NOTEBOOKS (1992).

empirical research might be useful.[100]

In many American towns and cities, law avoidance and law aversion were important historically for community survival. Consensus and harmony were used by small religious and ethnic communities to survive in the culture at large. But the United States is no longer a place of isolated communities. Nevertheless, in planning the 1976 Pound Conference, Chief Justice Burger built an ethic out of nostalgic elements available in the culture at large and so developed a strategy that transformed the conflict of the 1960s and 1970s that it did not effectively threaten opposing state and corporate interests, nor did it expose the corporate drive to restrict victims' rights through "tort reform."[101]

The effectiveness of thought control is generally measured in relation to freedom from state coercion. People who use such terms as "manufacturing consent," as most recently Noam Chomsky,[102] or "engineering of consent," are speaking about thought controls and mind colonization. Consent is not manufactured out of thin air; therein lies its power. It is pieced together from the culture at hand, and as David Noble put it in the title of his first book, it becomes *America By Design.*[103] The examples articulated in this paper speak of a diverse group of people in the practice of law affected by intense influence or mind colonization. Some of these people are elites and considered powerful while some were in the category of litigant or subordinate worker. Intense influence is found at all levels. As we learned by comments from uncensored workers, there is still a critical sense at large, a "surprise factor." Without a critical sense in law, lawyers become commodities, unable to distinguish fact from fiction. Our vision of freedom atrophies while the need for a body of law and a legal education that recognizes the dangers of intense influence remains unrealized.

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100. There is so much in American legal policy that operates on myth rather than empirical evidence. For example, the notion that plea bargaining can be justified because both sides benefit, or because plea bargaining saves a justice system that would collapse were it to be abolished. Again we have assertions and a dearth of empirical evidence.

101. JOANNE DOROSHOW, PUBLIC CITIZEN REPORT, THE CORPORATE DRIVE TO RESTRICT THEIR VICTIM'S RIGHTS (1986); *see also* DEBORAH R. HENSLER ET AL., TRENDS IN TORT LITIGATION (1987).

102. *See* STUART EWEN, CAPTAINS OF CONSCIOUSNESS (1976); EDWARD L. BERNAYS, BIOGRAPHY OF AN IDEA: MEMOIRS OF PUBLIC RELATIONS COUNSEL (1965); HERMAN & CHOMSKY, *supra* note 35; VANCE PACKARD, THE HIDDEN PERSUADERS (1957).

103. DAVID F. NOBLE, AMERICA BY DESIGN (1977) (describing the construction of American institutions and culture by the large industrialists of the 19th century).